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IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-235

MARCO DEFUNIS, ET AL., *Petitioners,*

v.

CHARLES ODEGAARD, ET AL., *Respondents.*

On Writ of Certiorari to the Supreme Court of the State of Washington

BRIEF OF A GROUP OF LAW SCHOOL DEANS AS AMICI CURIAE

INTEREST OF THE AMICI

The *amici* are deans of law schools located throughout the United States who are concerned with the effect a decision reversing the Supreme Court of Washington would have on the admission policies and student composition of law schools throughout the nation. The deans believe that law schools must retain the administrative flexibility and discretion to employ a wide range of criteria, both subjective and objective, in selecting those students who can best contribute to their law school and to the legal profession. The deans believe that it is equally imperative that law schools continue to be permitted to consider the minority status of an applicant as one criterion in the admissions process so that they can effectively fulfill their obligation to take affirmative steps to overcome the continuing effects of past discrimination in law schools and in the legal profession.

CONSENT OF THE PARTIES

Marco DeFunis, *et al.*, and Charles Odegaard, *et al.*, by their attorneys, have consented to the filing of this brief. Their letters of consent are on file with the Clerk of this Court.

QUESTION PRESENTED

Does a state supported school of law violate the Equal Protection clause of the Fourteenth Amendment when, in endeavoring to overcome the effects of past discrimination, it considers an applicant's racial or ethnic background among the many factors it weighs in determining whom to admit?

SUMMARY OF ARGUMENT

The University of Washington Law School, like most law schools, employs a wide range of criteria in selecting students for admission who can best contribute to the law school and to the legal profession. These law schools have found that many of the goals they hope to accomplish through their admission policies would go unrealized were they mechanically and uncritically to accept candidates solely on the basis of college grade averages and LSAT scores. Several of the most important of these admission policies require the law schools to consider the race and ethnic background of the applicant as one of the many factors that are examined in reaching a decision. These policies include the desire to insure a representative student body, the desire to help overcome the critical shortage of minority group lawyers so that all groups are represented in the profession so influential in both public and private policy decisions in the United States, and, most important of all, the desire to remedy the continuing effects of racial and ethnic discrimination

which has for so long denied minority groups their rightful place of equality in American society. Such voluntary efforts to overcome our nation's legacy of slavery and discrimination are constitutionally permissible and should be encouraged.

ARGUMENT

The Admissions Policy of the University of Washington School of Law Represented the Exercise of Sound Administrative Judgment.

I. DETERMINING WHOM TO ADMIT TO A LAW SCHOOL CLASS INVOLVES WEIGHING A MYRIAD OF FACTORS, BOTH SUBJECTIVE AND OBJECTIVE.

Choices among different people are generally difficult. Choosing among applicants for a law school class is no exception. Indeed, in the case of the University of Washington Law School in its selection of the class entering in the fall of 1971 the difficulties were staggering. There were 1601 applications for no more than 150 positions in the class. (Finding X, A. 48) [1] Since most of the applicants were considered capable of doing the work which is required in law school, the school faced two difficult questions: What criteria were to be used to choose among capable applicants? How can those criteria be applied within the limits of the manpower available to review the applications and the time available for this process?

The school found appropriate and workable answers to both questions. In selecting applicants for admission the admissions committee followed this standard:

> "In assessing applications, we began by trying to identify applicants who had the potential for out-

[1] References to material in the Single Appendix are denoted herein as "A."

> standing performance in law school. We attempted to select applicants for admission from that group on the basis of their ability to make significant contributions to law school classes and to the community at large." (A. 34-5)

The committee's interpretation of this standard was guided in part by the University policy to eliminate "the continued effects of past segregation and discrimination" against minority group members. *DeFunis* v. *Odegaard*, 82 Wn. 2d 11, 19, 507 P. 2d 1169, 1175 (1973).

Members of the admissions committee spent about 1300 hours in the process of deciding whom to admit. Much more time would have been necessary if certain steps had not been taken to facilitate the decision-making process. For each applicant a predicted first year average (PFYA) was calculated based on college grades, the LSAT aptitude score, and the LSAT writing score, and this figure was used to separate the applications into three groups, which received different levels of attention. Secondly, applications from minority group members were considered separately. These steps were taken in order to establish general criteria applicable to all candidates and to insure that special factors relevant to minority candidates were taken into consideration. No applicant was either accepted or rejected solely on the basis of his or her PFYA. No applicant was either accepted or rejected solely on the basis of his or her race or ethnic background. *DeFunis* v. *Odegaard*, 82 Wn. 2d at 17, 19, 20, 39-40, 507 P. 2d at 1173, 1174, 1175, 1185-86.

The PFYA, based upon the LSAT score and college grades, was only one part of the decision-making process. It stands out because it is the only factor which is quantifiable, but this should not lead to an

overrated estimate of its importance. Its weight might vary from applicant to applicant. For example, experience with particular colleges might indicate that their grades predicted very well the law school grades of students coming from it. Such grades would be relied on more than grades from a school which had sent few students to the law school before or from a school whose grades did not predict law school performance. Two students were admitted, moreover, who had no grades at all from the last two years of college. (A. 40-41)

Grades and test scores are not all that schools consider in determining whom to admit. Law schools (and other institutions of higher education) use a variety of criteria in reviewing applications. For example, the University of Washington Law School gave preference to a certain class of veterans, men who had been admitted in the past but had been unable to attend the law school because of the draft. These applicants were admitted automatically. (A. 31) In some cases these veterans could not meet current standards. Though one could argue that admitting such a veteran deprives a better qualified applicant of a place in the law school, considerations of fairness and of national policy make this preference unobjectionable.[3]

Some state universities and law schools give preference to residents of the state, though no claim is made that residents of the particular state are better students. In fact, petitioner argued unsuccessfully below that the University of Washington was required

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[3] Preference for veterans is a common feature of many of our laws. *See, e.g.*, 5 U.S.C. §§ 3309, 3312; 38 U.S.C. §§ 1681, 1801-27; 42 U.S.C. § 1477; 43 U.S.C. § 186; 50 U.S.C. App. §§ 459, 1884.

to give such a preference under state law. Other schools give preference to nonresidents.

Preference is sometimes given to children of alumni, even though at most schools this would work to the disadvantage of minorities, as does a preference for those applicants who have famous or wealthy parents. *Cf. Guinn* v. *United States*, 238 U.S. 347 (1915); *Meredith* v. *Fair*, 298 F. 2d 696 (C.A. 5, 1962). *See O'Neil, Preferential Admissions: Equalizing the Access of Minority Groups to Higher Education*, 80 YALE L. J. 699, 703-05 (1971).

The LSAT score is more closely related to academic competence, but it is both an attractive and a dangerous criterion. It is attractive because it is the sole common denominator among all the applicants and its three-digit character gives it the appearance of objectivity and precision. It is dangerous because at its best the information which it gives us is limited, and its appearance may be misleading.

The LSAT is designed to predict success in first year law school courses; its usefulness in doing this is accepted by almost all law schools. But it has the limitations that any test of this type has in that it is subject to errors of measurement[8] and it predicts first year grades imperfectly. It predicts grades well enough to be very useful in considering large numbers of students, but it leaves much uncertainty when individual

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[8] A score, for example, of 550 indicates that there are two chances out of three that the score reflecting the true ability of the individual is between 520 and 580. Thus to prefer the applicant with a score of 550 to one with a score of 520 or 530 has questionable justification. If, therefore, there are one or two hundred applicants all of whom have scores within 60 points of each other, the LSAT score is a very dubious basis for comparison. *See* Conslus, *The Law School Admission Test and the Minority Student*, 1970 U. TOLEDO L. REV. 501, 512-13.

students are considered. For example, if one is comparing a student with a 600 to one with a 500 one must realize that there are many factors which might lead the 500 student to perform as well as the 600 student. Motivation, financial problems, family problems, self-confidence, ability to get along with other students and with members of the faculty, interest in the courses, the possibility of illness—these are not measured on the LSAT. *See* Consalus, *supra* at 513.

In short, the selection of students for admission to law school involves the exercise of informed judgment. A mechanistic ranking of candidates is not necessarily in the interest of the law school, the legal profession or society. Here the University of Washington weighed a multiplicity of factors, and no one factor was the *sole* basis for granting or denying admission to the law school. Accordingly, courts should be very reluctant to interfere with the difficult exercise of discretion which is required by the law school admissions process. A law school can be compared to a school board trying to devise an educationally sound remedy for racial imbalance and the problems resulting from unequal education:

> "The School Board, in the operation of the public schools, acts in much the same manner as an administrative agency exercising its accumulated technical expertise in formulating policy after balancing all legitimate conflicting interests. If that policy is one conceived without bias and administered uniformly to all who fall within its jurisdiction, the courts should be extremely wary of imposing their own judgment on those who have the technical knowledge and operating responsibility for the educational system." *Deal* v. *Cincinnati Board of Education*, 369 F.2d 55, 61 (C. A. 6, 1966), *cert. denied*, 389 U.S. 847 (1967).

Accord, Swann v. *Charlotte-Mecklenburg Board of Education,* 402 U.S. 1 (1971); *Wanner* v. *County School Board of Arlington County, Virginia,* 357 F.2d 452 (C.A. 4, 1966).

II. THE RACIAL AND ETHNIC BACKGROUND OF APPLICANTS IS AN APPROPRIATE FACTOR TO CONSIDER IN DETERMINING ADMISSIONS TO LAW SCHOOL.

We contend that race and ethnic background is an appropriate factor to consider in determining who is or is not admitted to a law school. The consideration given to race and ethnic background is included as part of the admission formula not because it *per se* is a test of the qualifications of an applicant to law school, but because race and ethnic background represents a congery of factors—discussed below—that a law school is justified in taking into account.[4] Since these interrelated factors, unlike race and ethnicity, are not immutable, we can expect them to disappear eventually. At such time, the consideration of race and ethnicity *qua* race and ethnicity no longer will be appropriate.[5] But "[t]he promise of even handed jus-

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[4] *Cf.* Springfield School Committee v. Barksdale, 348 F.2d 261, 266 (C.A. 1, 1965): "The defendants' proposed action [eliminating racial concentrations in schools] does not concern race except insofar as race correlates with proven deprivation of educational opportunity . . . . It would seem no more unconstitutional to take into account plaintiffs' special characteristics and circumstances that have been found to be occasioned by their color than it would be to give special attention to physiological, psychological or sociological variances from the norm occasioned by other factors. That these differences happened to be associated with a particular race is no reason for ignoring them."

[5] For example, although Asian-Americans, Jewish-Americans, and Italian-Americans all have been subject to discrimination, this discrimination and its effects appear not to present a barrier to their admission to the University of Washington Law School.

tice in the future does not bind our hands in undoing past injustices." *United States* v. *Louisiana*, 252 F. Supp. 353, 396 (E. D. La. 1963), *aff'd*, 380 U.S. 145 (1965).

It is unrealistic to suggest that at this time color blindness is possible in the evaluation of applications for law school admission. The history of discrimination in the United States based on color, culture, and language is too long, and the continuing effect of that discrimination is too clear in the low educational and economic status of victimized minority groups to allow color blindness. "After centuries of viewing through colored lenses, eyes do not adjust when the lenses are removed." *Associated General Contractors of Massachusetts, Inc.* v. *Altshuler*, 6 EPD ¶ 8993 (C.A. 1, 1973). *See also, United States* v. *Jefferson County Board of Education*, 372 F. 2d 836, 876 (C. A. 5, 1966), *cert. denied sub nom. Board of Education of Bessemer* v. *United States*, 389 U.S. 840 (1967).

An admissions committee would face an intractable task in evaluating the potential of a minority applicant if it could not consider the obstacles which the applicant has had to overcome in his or her academic and personal development. How can an admissions committee evaluate in a color blind way the handicap of a segregated elementary or secondary education, how can it evaluate the effect on an applicant of being placed in a class for the mentally retarded in elementary school merely because the student's primary language was not English, or how can it evaluate the effect of attending boarding school hundreds of miles from home where the student's language and culture were systematically denied? These judgments can not be made without considering the status of the ap-

plicant as a member of a victimized minority. As the Court of Appeals for the Fifth Circuit noted:

> "How then is this constitutional imperative to be achieved in a society that still bears the ugly scars of decades of racial segregation with all of its discriminations? For it is in this social structure that the problem arises. And it is in this social structure—not that of the hoped for idyllic state when the last vestige of this invidious distinction has gone away—that the constitutional ideal must be made to work." *Brooks* v. *Beto*, 366 F.2d 1, 22-23 (C.A. 5, 1966).[6]

A. Purely mechanical criteria are an inadequate basis for determining the composition of a law school class.

While there are problems present in the interpretation of the grades and the LSAT scores of any applicant, with minority applicants these problems are multiplied. With white applicants law schools have had years of experience in evaluating the significance of LSAT scores. With minority applicants there is little experience either at the University of Washington or at other law schools. The problems peculiarly related to race with which minorities must cope at all levels of education can affect college grade averages and results on standardized tests.

The law school had reason to believe that a low score by a minority applicant on the LSAT might not be a bar to acceptable performance in law school. Students who must cope with racially related disadvantages throughout their educational careers cannot be expected to perform as well on the LSAT as other students but still might have the underlying ability

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[6] *See* Pinderhughes, *Increasing Minority Group Students in Law Schools: The Rationale and the Critical Issues*, 20 BUF. L. REV. 447, 454 (1971).

to succeed in law school. Even with lower scores or grades, the minority students accepted at the Washington Law School were found to be qualified. Especially if the student attends a summer session prior to law school to improve his basic skills and to familiarize himself with the study of law and if the faculty is willing to give extra attention to the needs of minority students, there is a good likelihood that such students will succeed in law school despite relatively low PFYAs. Thus to require the school to consider white and minority applicants together on the basis of their PFYAs is to require it to do something which would prevent its taking account of other highly legitimate considerations discussed herein.

The LSAT is designed to predict first year averages. More important ultimately, however, is the capability of the law student at the end of his law school career. For whites, first year grades generally are a good indicator of how well the student will do in the second and third years. For minorities they may be a less accurate predictor. Adjusting socially and academically to the demands of law school can be the primary activity of the first year. Overcoming educational deficiencies and gaining needed self-confidence takes time.

B. The desirability of a heterogeneous student body is an appropriate element of a law school's admission policy.

The University of Washington had sound educational reasons for wanting a multi-racial student body.[7] Many of the most serious legal and public pol-

[7] Until the last few years the number of minority law students in the entire country as well as at the University of Washington was extremely low. In the 1964-65 school year there were approximately 700 black law students, including 267 in predom-

icy issues that the lawyer will face in his career are related to the issues of race and poverty. All students will gain from having students of different racial and ethnic backgrounds participate in in-class and out-of-class discussions of these issues and from learning to live in a multi-racial community.[8]

Success in law school cannot be viewed as an end in itself. A law school is a professional school, training men and women to go out into the world and act as lawyers. The wisdom of *Sweatt* v. *Painter,* 339 U.S. 629, 634 (1950), is as relevant today as it was a generation ago:

> "[A]lthough the law is a highly learned profession, we are well aware that it is an intensely practical one. The law school, the proving ground for legal learning and practice, cannot be effective

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inantly black schools in the South. This represents only 1.3 percent of the total law school enrollment, barely enough for blacks to maintain their proportion of the legal profession. *O'Neil, Preferential Admissions: Equalizing Access to Legal Education,* 1970 TOLEDO L. REV. 281, 300. In the 1967-68 school year, after many law schools had begun to recruit minority students, there were only 180 Mexican Americans and 32 American Indians enrolled in law school. *Id.* at 301 n. 58. Enrollment figures for subsequent years are as follows: 1969-70: black, 2128; Mexican American, 412; American Indian, 72. 1971-72: black, 3732; Mexican American, 881; American Indian, 140. *1971 Survey of Minority Group Students in Legal Education, quoted in* 1 1972 PROCEEDINGS OF THE ASSOCIATION OF AMERICAN LAW SCHOOLS 74.

[8] *See* Swann v. Charlotte-Mecklenburg Board of Education, 402 U.S. at 16: "School authorities are traditionally charged with broad power to formulate and implement educational policy and might well conclude, for example, that in order to prepare students to live in a pluralistic society each school should have a prescribed ratio of Negro to white students reflecting the proportion for the district as a whole. To do this as an educational policy is within the broad discretionary powers of school authorities . . . ."

> in isolation from the individuals and institutions with which the law interacts. Few students and no one who has practiced law would choose to study in an academic vacuum, removed from the interplay of ideas and the exchange of views with which the law is concerned."

The great increase in the number of qualified applicants to law school,[9] coupled with a mechanical use of the PFYA, threatened to make the University of Washington Law School into just such an "academic vacuum."

C. The nature of legal services required by the public is an appropriate consideration for a law school in constituting its student body.

The greatest shortage of legal services is in minority communities—ghettos, barrios, reservations. Members of these communities have been denied an adequate number of qualified lawyers and judges who understand from firsthand experience the seriousness of the many problems facing these communities and the urgent need to find both short-range and long-range solutions. While some white lawyers will practice in these communities and be as effective as a minority lawyer, minority lawyers are more likely to serve minority communities and in some instances will be able to provide better service:[10] They have greater

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[9] In the past three years the number of applications had gone from 704 to 1601. DeFunis v. Odegaard, 82 Wn. 2d at 15, 507 P.2d at 1172-73.

[10] Few of the nation's lawyers are minority group members. In 1966 only about one percent was black. Gellhorn, *The Law School and the Negro*, 1968 DUKE L.J. 1068, 1073. Even if the size of the legal profession could be kept constant, an additional 30,000 black attorneys would need to be trained before blacks would achieve parity in the legal profession. Gellhorn, *id.* at

familiarity with the community and its problems, they are able to communicate more effectively with the residents and gain their trust, and—in the case of the Spanish-speaking community—their ability to speak the same language is indispensable.[11] In some instances, the interests of a minority group and those of whites will be adverse. In such a case the minority group might be better served by a lawyer who shared the same interests.

This is not meant to imply that minority law students should be only trained to and should be ex-

1073. Nationwide figures for Mexican Americans do not appear to be available. Data from specific areas are suggestive of the problem, however. In Denver, for example, about nine percent of the population is Mexican American, yet only 10 of the city's 2,000 attorneys (one half of one percent) have Spanish surnames. O'Neil, 80 YALE L.J. at 727. In 1968, less than one percent of the attorneys in California had a Spanish surname, although 12 percent of the state's population is of Spanish surname. Reynoso *et al., La Raza, the Law, and the Law Schools,* 1970 TOLEDO L. REV. 809, 816. In 1968 there were almost no Indian lawyers in the country. *See* discussion in Strickland, *Redeeming Centuries of Dishonor: Legal Education and the American Indian,* 1970 TOLEDO L. REV. 847, 861-66. With specific reference to the state of Washington, in 1970, of the 4,550 active lawyers, only 20 were blacks (three of whom were judges), five were part or full-blooded American Indians and none was Mexican American. Thus, there was one Anglo lawyer for approximately every 720 whites, one black lawyer for approximately every 4,195 blacks, one American Indian lawyer for approximately every 6,677 Indians and not one Mexican American lawyer for the 70,734 Mexican Americans in the state. Morris, *Equal Protection, Affirmative Action and Racial Preferences in Law Admissions,* 49 WASH. L. REV. 1, 38 (1973).

[11] *Cf.* Graglia, *Special Admission of the "Culturally Deprived" to Law School,* 119 U. PA. L. REV. 351, 354 (1970), *with* TWENTIETH CENTURY FUND, ADMINISTRATION OF JUSTICE IN THE SOUTH 3 (1967) *and* Oppenheim, *The Abdication of the Southern Bar* in L. FRIEDMAN, ED., SOUTHERN JUSTICE 127 (1965). *See* Sobol v. Perez, 289 F. Supp. 392 (E.D. La. 1968).

pected to serve minority communities. On the contrary, they should receive the same training as every other law student and should be free to practice whatever kind of law in whichever community they choose.[12] In fact, there has been an increasing realization by law firms, government agencies and corporations that minority lawyers have a vital role to play in fulfilling the responsibilities of the legal profession, and career opportunities for minority lawyers outside the minority community are bright.

D. It is appropriate for a law school's admissions policy to be sensitive to the pivotal role played by the legal profession in our national life.

Law firms have a leading role in our society, and lawyers are well represented in public office at all levels in the local, state, and federal governments, and in private corporations. We are "a nation that professes deep regard for the dignity of man and that in practice relies to an extraordinary degree upon the advice of professional lawyers in the formation and execution of policy." Lasswell & McDougal, *Legal Education and Public Policy: Professional Training in the Public Interest,* 52 YALE L.J. 203, 291 (1943). The insight and particular sensitivity which minority group lawyers and judges can bring to the law as an institution has been lacking. Thus, if a racial or ethnic group is to share in the power, responsibility, and benefits of society it must be well represented among the legal profession.

The legal profession, moreover, has a special responsibility to set an example for the rest of the na-

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[12] *See* Bell, *Black Students in White Law Schools: The Ordeal and the Opportunity,* 1970 TOLEDO L. REV. 539, 551-58.

tion for providing equal opportunity and overcoming the effects of past discrimination, for lawyers have a special duty to uphold the Constitution and the legal system.

Minority lawyers also have an important role as citizens in the minority community. Lawyers often have leadership roles, and they provide an example to young people, showing them that it is possible to have a professional career despite their racial or ethnic background.

> "The most striking factors underlying motivation to seek entry into law school may be related to close personal association with a lawyer as a relative, or a friend, and to encouragement from family, friends, or counsellors. These factors are too often missing in law-deprived communities where there is a lack of exposure to opportunities in law, and inadequate information and counselling at all school levels." Pinderhughes, *supra* at 454.

E. It is appropriate for the admissions policy of a public law school to be sensitive to the need to overcome the effects of past and present illegal discrimination suffered by minority group members.

1. The paucity of minority lawyers is the result of discrimination.

The factors which have led to the small number of minority lawyers are many. They are all the result—direct or indirect—of discrimination and would continue unabated even with "color blind" treatment. Accordingly, a significant increase in the number of minority lawyers cannot be expected without color conscious efforts.

While not the universal pattern, until recently many law schools refused to admit blacks, and many blacks who were able to attend law school could only do so at

all Negro institutions. *Cf. Sweatt* v. *Painter, supra. See* Gellhorn, *supra* at 1069-70. As late as 1960 the Duke University School of Law would not admit blacks, and in 1962 the University of Richmond refused to admit two blacks because of their race. Gellhorn, *id.* at 1070 n. 12. If a black did manage to graduate from law school he faced discrimination from bar associations, law firms, and government agencies. *See* Gellhorn, *id.* at 1070, 1093. Thus blacks were discouraged from going to law school by their prospects after graduation, were denied admission to law school if they nevertheless applied, and were less likely to be able to practice law if they graduated.[13]

Secondly, discrimination in elementary and secondary education throughout the country makes it less likely that minorities will attend college and obtain degrees than whites.[14] Since to be admitted to almost all law schools one must have an undergraduate degree, the pool of potential minority applicants to law school is severely restricted compared to that of whites.[15]

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[13] For information concerning the participation of Mexican Americans and American Indians in the legal profession *see* Reynoso, *et al., supra,* and Strickland, *supra.*

[14] Nearly twenty year ago, in Brown v. Board of Education, 347 U.S. 483 (1954), this Court noted that school segregation "has long been a nationwide problem, not merely one of sectional concern." *Id.* at 491 n. 6. It continues to be a nationwide problem. *See, e.g.,* Keyes v. School District No. 1, Denver, Colorado, 413 U.S. 189 (1973).

[15] For persons in the 25 to 34 year old bracket in 1970, 16.6 percent of whites had graduated from college, while only 6.1 percent of blacks, 5.3 percent of persons of Spanish heritage, 1.1 percent of Indians, and 3.6 percent of Philippine Americans. BUREAU OF THE CENSUS BLS REPORT No. 394, SERIES P-23 No. 38, Table 67; U. S. BUREAU OF THE CENSUS, 1970 CENSUS OF POPULATION, PC (2)1c, Table 6, PC(2)1f, Table 5, PC(2)1g, Table 35.

Thirdly, the combined effect of discrimination in education and employment has resulted in minorities having a lower median family income than whites.[16] They are thus less able to afford the expense of law school. Lower incomes also make it more burdensome to postpone full time employment for three years.

The effects of discrimination in education and employment and other areas of life are continuing and cumulative. Color blindness will not help a law school remedy the effects of these barriers. Indeed, when a remedy for past discrimination is being fashioned the consideration of race becomes necessity:

> "What we have said may require classification by race. That is something which the Constitution usually forbids, not because it is inevitably an impermissible classification, but because it is one which usually, to our national shame, has been drawn for the purpose of maintaining racial inequality. Where it is drawn for the purpose of achieving equality it will be allowed, and to the extent it is necessary to avoid unequal treatment by race, it will be required." *Norwalk CORE* v. *Norwalk Redvelopment Agency*, 395 F.2d 920, 931 (C.A. 2, 1968).

See also McDaniel v. *Barresi*, 402 U.S. 39, 41 (1971).

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[16] In 1972 the median income of Negro families was $6,864 as compared to $11,549 for whites. U. S. Bureau of Census, Current Population Reports, Series P-23, No. 46, Table 7 (1972).

2. Voluntary remedial action is not dependent upon a finding of discrimination.

Since the effects of discrimination are pervasive throughout American society, it is appropriate for all institutions to take affirmative action to overcome racial inequalities. Courts have not found the absence of preexisting discrimination a bar to school boards' taking voluntary action to increase racial balance within them. *Offerman* v. *Nitowski*, 378 F.2d 22, 24 (C.A. 2, 1967).[17] Although *Swann* v. *Charlotte-Mecklenburg, supra*, arose in the context of the dismantling of a state required dual school system, it suggested that voluntary remedial action is permissible. 402 U.S. at 16; *North Carolina State Board of Education* v. *Swann*, 402 U.S. 43, 45 (1971). *Accord, Wanner* v. *County School Board of Arlington County, Virginia*, 357 F.2d at 454. Where courts have declined to order a remedy for *de facto* segregation they have indicated that voluntary remedies are allowed. *Deal* v. *Cincinnati Board of Education*, 369

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[17] *Accord*, Fuller v. Volk, 230 F. Supp. 25 (D.N.J. 1964), *vacated on other grounds*, 351 F.2d 323 (C.A. 3, 1965), *adhered to on the merits*, 250 F. Supp. 81 (D.N.J. 1966); Guida v. Board of Education, 26 Conn. Supp. 121, 213 A.2d 843 (Super. Ct. 1965); Morean v. Board of Education, 42 N.J. 237, 200 A.2d 97 (1964); Addabbo v. Donovan, 16 N.Y.2d 619, 209 N.E.2d 112, 261 N.Y.S.2d 68 (1965) *cert. denied*, 382 U.S. 905 (1965); Balaban v. Rubin, 14 N.Y.2d 193, 199 N.E.2d 375, 250 N.Y.S.2d 281, *cert. denied*, 379 U.S. 881 (1964). Similarly, courts have held that state legislative or administrative action requiring school boards to take racially conscious actions to eliminate racial imbalance need not be based on any past or present discrimination. Tometz v. Board of Education, Waukegan City, 39 Ill.2d 593, 237 N.E.2d 498 (1968); School Committee of Boston v. Board of Education, 352 Mass. 693, 227 N.E.2d 729 (1967), *appeal dismissed*, 389 U.S. 572 (1968); Booker v. Board of Education, 45 N.J. 161, 212 A.2d 1 (1965); Balsbaugh v. Rowland, 447 Pa. 423, 290 A.2d 85 (1972).

F.2d at 65; *Springfield School Committee* v. *Barksdale*, 348 F.2d at 265-66.

In the area of employment affirmative action to increase the number of minority employees also has been allowed without a judicial finding that a particular employer or union engaged in discriminatory behavior. In *Porcelli* v. *Titus*, 431 F.2d 1254 (C.A. 3, 1970), *cert. denied*, 402 U.S. 944 (1971), the Third Circuit allowed the Newark School Board to discontinue the use of a promotion list established in 1953 and of oral and written tests used to determine who was qualified to become a principal or assistant principal. While the small number of black principals and assistant principals (3 out of 139) might have supported a finding of discrimination, the court did not rely on such a finding nor did it consider whether the tests employed were job related or whether any other evidence of discrimination was present. The court instead relied on the relevance of color to the job. *Cf. Chance* v. *Board of Examiners*, 458 F.2d 1167 (C.A. 2, 1972); *Local 189, United Papermakers and Paperworkers, AFL-CIO* v. *United States*, 416 F.2d 980, 991 (C.A. 5, 1969), *cert. denied*, 397 U.S. 919 (1970). *See also Contractors Association of Eastern Pennsylvania* v. *Secretary of Labor*, 442 F.2d 159 (C.A. 3, 1971), *cert. denied*, 404 U.S. 854 (1971).

In *Norwalk CORE* v. *Norwalk Redevelopment Agency, supra*, the Agency was required to take race into account in providing relocation housing because discrimination in the housing market made it more difficult for blacks than for whites to find legally adequate housing. There was no suggestion that the Agency was responsible for the discrimination, and

at that time discrimination in the private housing market was not considered illegal.

The situation of the law school is similar to that of the school boards, the employers or unions, and the redevelopment agency.

The law school can be viewed as the last step in an educational process that was permeated by illegal discrimination and segregation. It is justified in taking into account the "broader patterns of exclusion and discrimination practiced by third parties and fostered by the whole environment in which most minorities must live." *Johnson* v. *Pike Corporation of America,* 332 F. Supp. 490, 496 (C.D. Cal. 1971). Accordingly, it is no less permissible for a school to take into account and seek to remedy discrimination by other parts of the nation's educational system than it is to remedy its own. *Cf. Oregon* v. *Mitchell,* 400 U.S. 112, 133, 146-47, 216-17, 282-84 (1970); *Gaston County* v. *United States,* 395 U.S. 285 (1969).

Although there has been no allegation that the University of Washington Law School or the state of Washington discriminated in any way against minorities, the small number of minority students at the law school in prior years might reasonably have led the school to be concerned that its admissions policies had in fact had a discriminatory effect.

In short, if courts have *required* governmental agencies to remedy discrimination which they did not cause, *Norwalk CORE, supra,* surely this Court should *allow* the law school to remedy such discrimination.

3. Remedial action may impinge on the expectations of others.

Both governmental and private action in our society typically disadvantages some people—either di-

rectly or incidentally—as it benefits others. This is as true for actions taken to remedy racial inequalities as it is in other areas.

In employment cases where affirmative action plans are ordered or upheld there is generally some harm to potential white employees. As Judge Marvin Frankel said in discussing the remedies of Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e *et seq.*:

> "[I]t should be recognized . . . that the remedies Congress ordered are not required to be utterly painless. The court knows at least some of the things the whole world knows. We are aware that there is unemployment. We are even more keenly aware that this case is launched by statutory commands, rooted in deep constitutional purposes, to attack the scourge of racial discrimination in employment." *United States* v. *Wood, Wire and Metal Lathers International Union, Local Union 46*, 341 F. Supp. 694, 699 (S.D.N.Y. 1972), *aff'd.*, 471 F.2d 408 (C.A. 2, 1973), *cert. denied*, 412 U.S. 939 (1973).

In *Porcelli* v. *Titus, supra,* individual whites did not receive the promotions which they thought they had every reason to expect. While in most instances there will be no identifiable whites who are deprived of a job or a promotion, there will be a more or less readily identifiable class of whites potentially eligible for work or promotion. *See Carter* v. *Gallagher*, 452 F. 2d 315, *modified en banc*, 452 F.2d 327 (C.A. 8, 1972), *cert. denied*, 406 U.S. 950 (1972); *Contractors Association of Eastern Pennsylvania* v. *Secretary of Labor, supra; United States* v. *Bethlehem Steel Corporation*, 446 F. 2d 652, 663 (C.A. 2, 1971); *Associated General Contractors of Massachusetts, Inc.* v. *Altshuler, supra.*

Likewise the fact that whites (or blacks) might be inconvenienced by steps taken to dismantle a dual school system is not considered an argument with any weight.

> "The remedy for such segregation may be administratively awkward, inconvenient, and even bizaare in some situations and may impose burdens on some; but all awkwardness and inconvenience cannot be avoided in the interim period when remedial adjustments are being made to eliminate the dual school systems." *Swann* v. *Charlotte-Mecklenburg Board of Education,* 402 U.S. at 28.

In this case, as in cases remedying inequality in employment and education, the remedial action had an effect on who received the benefits of legal training by the University of Washington Law School. The remedy here was designed to eradicate the effects of past discrimination. To the extent that there were those whose expectations rested on the continuation of a system which perpetuated discrimination, they were likely to suffer some disappointment. But this disappointment was mild in comparison to what courts have allowed.[18]

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[18] Petitioner is not necessarily among those damaged by the school's action. Even if none of the 36 minority students had been admitted, his position on the waiting list would not have given him a position in the class. On the other hand, if the whole admissions process were to be done over using new criteria or procedures, there is no guarantee that he would be admitted.

CONCLUSION

For all these reasons the University of Washington Law School exercised proper discretion in admitting students to the class entering in the fall of 1971, and the judgment of the Washington Supreme Court should therefore be affirmed.

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